IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-295

FIRST NATIONAL CITY BANK,
Petitioner,

against

BANCO NACIONAL DE CUBA,
Respondent.

REPLY BRIEF OF PETITIONER

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The importance of the questions presented by this case, and the need to have them settled by this Court, is unquestioned. Respondent has made no effort to minimize the importance of these questions; indeed, its concentration on substantive conclusions emphasizes the need to have this Court take the case and settle the law.

The question now before the Court, on this petition, is whether or not a writ of certiorari should issue. The criteria of Rule 19(1)(b) have been met. The Solicitor General of the United States has urged that the petition be granted. The respondent's Brief in Opposition, however disingenuous its arguments on the merits, supports petitioner's position on this application.

1. *This Court should review the decision of the majority of the court below.* Rule 19(1)(b), Rules of the Supreme Court, provides that the writ may be granted, *inter alia:*

> Where a court of appeals . . . has decided an important question of federal law which has not been, but should

be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this court's power of supervision.

(a) The two to one decision below is in direct contravention of the decision in *Banco Nacional de Cuba* v. *Farr*, 383 F.2d 166 (2d Cir. 1967), *cert. den.* 390 U.S. 956 (*See* Pet. pp. 13, 14). Since the petition was filed, panels of the Second Circuit have twice reaffirmed the propriety of the role of the Executive Branch in determining the applicability *vel non* of the sovereign prerogative. *Heaney* v. *Government of Spain*, ___ F.2d ___ (2d Cir. 1971) (Slip Opinion No. 826, pp. 3971-3981, July 2; September, 1970 Term); *Isbrandtsen Tankers, Inc.* v. *President of India*, ___ F.2d ___ (2d Cir. 1971) (Slip Opinion No. 928, pp. 4559-4564, July 27; September, 1970 Term). In neither case was the decision below cited.

The decision below, in short, is a sport and should not be permitted to stand.

(b) The applicability of the act of state doctrine is an exclusively federal question of serious consequence in the international relations of the United States. The majority below held that the Judicial Branch will undertake to determine matters affecting our international relations without regard for the official opinions formally expressed by the Executive and Legislative Branches. This usurps the proper function of the other branches.

Respondent urges at length that the Judiciary should not heed the explicit pronouncements of the State Department and of Congress in this case: it should be borne in mind that this argument has not been made, nor is it likely to be made, by this respondent or any Communist or Socialist government when the Executive or Legislative intervened in judicial proceedings on its behalf. The

decision below seriously embarrasses our government in the conduct of our foreign affairs. *See* Memorandum for the United States as Amicus Curiae, pp. 2-4.

(c) The decision below is in conflict with the rule stated by this Court in *National City Bank* v. *Republic of China,* 348 U.S. 356 (1955) (*See* Pet. pp. 14-16). Respondent's attempt to distinguish that case as a "sovereign immunity" and not an "act of state" case is a fruitless exercise in semantics. It overlooks the fact that, in so far as a foreign sovereign may take refuge behind the act of state doctrine to prevent judicial scrutiny of the legal effect of its acts, the act of state doctrine is only an aspect of sovereign immunity.

2. *Respondent's arguments are neither appropriate at this juncture, nor are they well founded.* While it seems clear that respondent's argument of the merits is inappropriate at this time, and we must reserve our response for a hearing on the merits, certain of the more significant omissions and inaccuracies of the respondent's brief should be set right for the record.

(a) As concerns the "various positions" taken by the Department of State with respect to act of state issues, it should be noted that the defendant in *Pons* v. *Republic of Cuba,* 294 F.2d 925 (D.C. Cir. 1961) was a Cuban national. The Department could scarcely intervene in an action between a foreign government plaintiff and one of its own nationals; nor, where the dispute was between a foreign government and its own national, did any question of breach of international law arise. For a view that the act of state defense should not be available even in those circumstances, see the dissenting opinion of then Circuit Judge Burger, 294 F.2d, at 927.

Also, in *Rich* v. *Naviera Vacuba, S.A.,* 197 F. Supp. 710 (E.D.Va. 1961), *aff'd,* 295 F.2d 24 (4th Cir. 1961), the opinions both in the district court and in the court of

appeals were solely concerned with the effect to be given to the Department of State's suggestion of sovereign immunity, and its finding that the *Bahia de Nipe* was Cuban Government property. Whether the act of state doctrine was one of the "[q]uestions which merely lurk in the record" seems of no consequence, since the decisions themselves are based on the suggestion of immunity. *Webster* v. *Fall,* 266 U.S. 507, 511 (1925).

Further, nothing in the *Sabbatino* litigation indicates that the Executive may not determine that the act of state doctrine not be applied to a particular case, as it has here: that litigation was solely concerned with the situation where the Executive chose to remain silent.

These cases therefore indicate that the Department of State has consistently supported the applicability of the act of state doctrine, except where, as here, considerations of foreign policy compelled it to intervene in a particular case to suggest that the doctrine not be applied.

Regardless of its consistency of view, our courts have always deferred to the foreign policy determinations of the Executive, inasmuch as it is that branch of government, and not the Judiciary, that is competent to decide when our foreign relations require the sovereign prerogative to be allowed—or not to be allowed. As Judge Hoffman said in *Rich, supra,* 197 F. Supp., at 724:

> The short answer to these contentions is that no policy with respect to international relations is so fixed that it cannot be varied in the wisdom of the Executive. Flexibility, not uniformity, must be the controlling factor in times of strained international relations . . . It is not for a court to question such matters of policy, the reasons for action taken in specific cases, the alleged inconsistent positions asserted and the "findings" of the Executive.

And as Judge Hays observed in the dissent below:

> It is not the function of the courts to choose between competing foreign policy considerations . . . [t]he attitude of the United States towards foreign powers must be left, as in *Bernstein,* to the decision of the other branches of government. (Pet. A-12, A-13)

He also said that:

> . . . the majority, by applying the act of state doctrine after an independent evaluation of the merits of the State Department's decision, is usurping the same executive prerogative which it is the function of that doctrine to preserve. (Pet. A-12)

(b) It is not a mere "accident of pleading" that the act of state doctrine should not be available to bar adjudication of a counterclaim, pursuant to the rule of *Republic of China:* it is the essence of the exception that the sovereign itself has instituted the suit and that "fair play" requires that the special prerogative be denied, to the extent of the amount claimed by the sovereign.

(c) Respondent misrepresents the legislative history of the Hickenlooper Amendment. The clear language of the statute makes it applicable to petitioner's claim against Cuba in this case. The first opinion of the court of appeals to the contrary rested heavily on the testimony of Professor Olmstead, and in seeking review petitioner submitted the letter from Professor Olmstead in contradiction of the testimonial excerpts selected by the court below. That letter (Pet. App. G) is by no means the only legislative history opposed to respondent's limited view of the coverage of the Amendment. See R. B. Lillich, *International Law, 1970 Survey of New York Law,* 22 Syracuse L. Rev. 269, 273-277 (1971) and Note, 11 Va. J. Int'l Law 406, 411-413 (1971) for an extensive listing of such other legislative history.

(d) Respondent's arguments as to conformity with Rule 13 of the Federal Rules of Civil Procedure and the independence of Banco Nacional from the Cuban governmental structure of which it is an integral part (Resp. Br. pp. 11-15), should not distract this Court from the issue before it. The short answer is that in the transactions out of which this case arose, Banco Nacional acted exclusively as the agent of the Cuban government. Thus, on the "transactional test" to which respondent refers at page 14 of its brief, the inevitable conclusion, as found by the district court, and not affected by the court of appeals, is that "[t]here is no serious question that the Government of Cuba and Banco Nacional are one and the same for purposes of this litigation". Pet. App. E-4 (Bryan, J.).

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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